Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

VINCENT C. SCHOEMEHL, JR.,
Petitioner,

vs.

BERNARD F. EDWARDS, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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QUESTION PRESENTED

Whether the Due Process Clause is violated when a tenured public employee is suspended by an official delegated the authority to suspend in violation of local law?

LIST OF PARTIES

The caption of the case in this Court contains the names of all the parties.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

Comes now Vincent C. Schoemehl, Jr., petitioner, and respectfully prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Missouri filed February 14, 1989.

OPINIONS BELOW

The opinion of the Supreme Court of Missouri has not yet been reported. It is reprinted in the appendix hereto, pp. A-1-8, *infra.*

The opinion of the Court of Appeals of Missouri has not been reported. It is reprinted in the appendix hereto, pp. A-9-13, *infra.*

The Findings of Fact, Conclusions of Law, and Order of the 22nd Judicial Circuit Court, State of Missouri, has not been reported. It is reprinted in the appendix hereto, pp. A-14-19, *infra.*

JURISDICTION

The judgment sought to be reviewed was filed in the Supreme Court of Missouri on February 14, 1989. On March 14, 1989 the court entered its order overruling appellant's motion for rehearing. Jurisdiction to review the judgment in question by writ of certiorari is conferred upon this Court by 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION

U.S. Const., Amend. XIV provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The facts stated herein, unless otherwise noted, are drawn from the opinions of the Missouri Supreme Court and the Missouri Court of Appeals. References are to those opinions, as reproduced in the appendix.

On April 16, 1985, petitioner, the mayor of the City of St. Louis, appointed respondent to serve as a city court judge of the City of St. Louis, for a term ending April 1, 1989. Appendix A-1. This appointment was made pursuant to a city charter provision that authorized the mayor to appoint officials such as respondent and to remove them for cause. *Id.*, A-1. On May 30, 1986, Marie Jeffries, deputy chief of staff to the mayor, *Id.*, met with respondent, without giving him prior notice of the

meeting's agenda. *Id.*, A-4. Mrs. Jeffries told respondent that certain complaints had been made about respondent's courtroom demeanor, about his failure to pay outstanding parking tickets, and about his residency. *Id.*, A-4-5. Mrs. Jeffries explained to respondent the evidence upon which the charges were based, and respondent vigorously defended himself. *Id.*, A-10-11. After the meeting concluded, Mrs. Jeffries notified respondent that he was suspended without pay. *Id.*, A-5.

Respondent filed suit on June 4, 1986. He alleged that his suspension was unlawful for two reasons: 1) the suspension violated the state constitution's separation of powers provision, and 2) the suspension was "without due process and without a hearing." Amended Petition for Permanent Injunction, Temporary Injunction and Restraining Order, p. 8. On April 16, following a bench trial, the 22nd Judicial Circuit Court entered judgment. The court, not reaching the state constitutional question, entered judgment for respondent on his due process claim, a result it believed dictated by this Court's opinion in *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985). *Id.*, A-16-18. Specifically, the court believed that the process afforded respondent was inadequate because it believed that respondent was entitled to more than contemporaneous notice and because it believed that respondent was entitled to a hearing by one other than the one who had conducted the investigation, who would make the decision, and who had already made up her mind. *Id.*, A-18.

An appeal followed to the Missouri Court of Appeals. On May 3, 1988, that court filed its opinion. In dicta, the court indicated that it believed that there was no state constitutional prohibition forbidding the mayor to suspend a municipal judge; however the court believed it need not determine that issue because it found that respondent's suspension was lacking in procedural due process. *Id.*, A-12.

Like the trial court, the court of appeals looked to *Loudermill* for the applicable standard. *Id.* Like the trial court, the court

of appeals found that the suspension failed to meet that standard because the notice was contemporaneous with the meeting. *Id.* However, unlike the trial court, the court of appeals did not rely upon the supposed bias of Mrs. Jeffries; instead it identified a new deficiency: Mrs. Jeffries' reliance upon hearsay. *Id.*

Following that decision, the Supreme Court of Missouri transferred the case because of what the court believed to be the importance of the issues. *Id.*, A-2. This time, the state-separation of powers issue was met head on and the court squarely held that the mayor had the authority to suspend municipal judges. *Id.*, A-2-4. The court then turned to the due process issue. *Id.*, A-4-6. At the outset of its discussion of that issue, the court made it clear that it would not consider the due process claim under the state constitution: "We do not pursue this contention because the Supreme Court decisions construing the due process clause of the fourteenth amendment impose minimum procedural requirements with which the state and all governmental subdivisions must comply." *Id.*, A-4. Once again, *Loudermill* was looked to for the standard. *Id.*, A-4, A-5, and A-6.

The court decided the federal due process claim in favor of respondent. Acknowledging that it was doing so for reasons which differed from those relied upon by the trial court and by the court of appeals, *id.*, A-2, the court strongly hinted that it did not believe that the supposed defects relied upon by the court of appeals - contemporaneous notice and hearsay evidence - were of constitutional dimension. *Id.*, A-5. Rather, the court found that the process was constitutionally flawed because the decision to suspend was made by Mrs. Jeffries, whereas the power to suspend was placed by the city's charter in the mayor and the mayor alone. *Id.* The mayor, the court believed, was not required by *Loudermill* to preside over the hearing in person; but he was required to make the decision himself. *Id.*, A-6. As the evidence showed that the decision was made by Mrs. Jeffries and not the mayor, the court affirmed the circuit court and its order awarding respondent backpay.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

The Missouri Supreme Court's opinion transforms an unlawful delegation of executive authority, unlawful because the delegation violates a city charter, into an unconstitutional delegation of executive authority. This transformation is in conflict with decisions of several federal courts of appeals and with applicable decisions of this Court.

1. **The Missouri Supreme Court's decision that respondent's due process rights were violated because the city's charter was violated by the delegation of the suspension decision is in conflict with decisions of federal courts of appeals that have held that state law procedural entitlements will not be enforced in the name of the Constitution.**

The Supreme Court of Missouri reached its conclusion that the Due Process Clause was violated by an abbreviated syllogism that proceeded as follows: Mrs. Jeffries' decision to suspend plaintiff violated state law; therefore, the decision to suspend violated the United States Constitution. The omitted major premise of the enthymeme is this: Every decision to suspend an employee that violates state law violates the United States Constitution. This proposition is in conflict with the decisions of several courts of appeals.

It is directly in conflict with two Eighth Circuit cases where the City of St. Louis had dismissed an employee by a procedure that violated the City's charter and the ordinances and rules promulgated thereunder. In *State of Missouri ex rel. Gore v. Wochner,* 620 F.2d 183 (8th Cir. 1980), the Eighth Circuit agreed "with the conclusion of the [district] court that the violation of any rights that might arise exclusively by failure to comply with some of the procedures provided by city charter, ordinances and regulations thereunder, do not rise to the level of a federal constitutional violation." *Id.,* 620 F.2d at 185. So

reasoning, the Eighth Circuit sustained the dismissal of City of St. Louis employees. *Id.* More recently, the Eighth Circuit again stated that a layoff in violation of the Charter of the City of St. Louis does not *ipso facto* a due process violation make. See *Praprotnik v. City of St. Louis,* 798 F.2d 1168, 1177 (8th Cir. 1986), reversed on other grounds, *City of St. Louis v. Praprotnik,* 485 U.S. ____, 99 L.Ed.2d 107, 108 S.Ct. 915 (1988). The court held, therefore, that it was error to submit to the jury a due process claim based upon a violation of the charter of the City of St. Louis. *Id.* See also *Reese v. Kennedy,* 865 F.2d 186, 187 (8th Cir. 1989), where the Eighth Circuit held that the failure to follow state eviction procedures was not a constitutional violation.

The conflict between the Missouri Supreme Court and the Eighth Circuit is an especially critical conflict because Missouri lies within the Eighth Circuit. Unless and until the conflict is resolved, the citizens of Missouri will live under two very different regimes of federal constitutional law. The difficulties that inhere in such a situation are as obvious as they are critical. However, the opinion is also in conflict in principle with cases from other circuits. In *Archie v. City of Racine,* 847 F.2d 1211 (7th Cir. 1988) (en banc), the Seventh Circuit, canvassing the cases, concluded that "the violation of state law is not itself the violation of the Constitution." *Id.,* 847 F.2d at 1217. The court observed:

> The procedural guarantees of the Due Process Clause exist apart from state law, even though they depend on it. So, for example, if state law establishes procedural entitlements, these are not themselves property and will not be enforced in the name of the Constitution. *Olim v. Wakinekona,* 461 U.S. 238, 248-51, 103 S.Ct. 1741, 1746-48, 75 L.Ed.2d 813 (1983); *Hewitt v. Helms,* 459 U.S. 460, 471, 103 S.Ct. 864, 871, 74 L.Ed.2d 675 (1983); *Szabo Food Service, Inc. v. Canteen Corp.,* 823 F.2d 1073, 1081

(7th Cir. 1987); *Shango v. Jurich*, 681 F.2d 1091, 1100-01 (7th Cir. 1982).

Id.

Likewise, the Fifth Circuit, sitting en banc, stated that "[t]he constitutional procedural standards of the due process clause are, however, wholly and exclusively federal in nature: a violation of state law is neither a necessary nor a sufficient condition for a finding of a due process violation." *Stern v. Tarrant County Hospital District*, 778 F.2d 1052, 1059 (5th Cir. 1985) (en banc), cert. den. 477 U.S. 909 (1986).

These opinions are correct. The hallmark of due process is "fundamental fairness." *Lassiter v. Department of Social Services*, 452 U.S. 18, 24-25 (1981). That someone other than the officer vested by state law with the authority to make the suspension decision made the suspension decision in no way detracts from the fairness of the decision. Indeed, it is not difficult to conger a situation where the person vested with state law authority to make the decision will make the decision less fairly than one who is delegated that authority by the person who is vested with that authority. In any case, the decisions cited above show that the federal courts of appeals, unlike the Missouri Supreme Court, believe that such delegations cannot be unconstitutional merely because the delegations violate state law.

2. **The Missouri Supreme Court's decision that respondent's due process rights were violated by the delegation of the suspension decision is in conflict with applicable decisions of this Court rejecting the equivalence doctrine. To the extent that this Court's opinions may not have completely settled the question, it is an important question that ought to be settled by this Court.**

The decision of the Seventh Circuit in *Archie v. City of Racine* is based upon such precedents of this Court as *Snowden*

v. Hughes, 321 U.S. 1 (1944), where the Court has repeatedly rejected the "equivalence" doctrine whereby state law violations are transmuted into federal constitutional violations. *Archie*, 847 F.2d at 1216-1217. To those cases may now be added *DeShaney v. Winnebago County Department of Social Services*, 57 U.S.L.W. 4218 (1989), where the Court held once again that the violation of state law does not a due process violation make. *Id.*, 57 U.S.L.W. at 4221. That case, if not in direct conflict with the opinion below, is at least in important conflict in principle with it. Indeed, it may well warrant summary reversal pursuant to Rule 23. And to the extent that the conflict may be thought to be only one of principle and not a direct one, the decision presents an important and not decisively settled question of federal constitutional law that should be settled by this Court.

The equivalence principle embodied in the Missouri Supreme Court's opinion is not one that can be confined to employment decisions affecting public employees; logic will require that the principle be extended to the myriad decisions made by state and local officials in the myriad fields in which they act. However, even in the area of public employment, the adoption of this principle will have important consequences; each violation of a local ordinance, charter, statute, or state constitution, now federally constitutionalized, will provide the foundation for a 42 U.S.C. §1983 case. Employees, enticed by the prospect of attorney's fees and the other allurements of a §1983 action, will spurn the state administrative remedies to which policy properly confines them at present. And, once the principle is extended beyond the employment context, a Copernican revolution in constitutional law will have been wrought whereby each violation of state law will be a violation of the federal constitution. Whether such a revolution should take place is an important question of federal law that ought to be decided by this Court.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT OF MISSOURI
EN BANC

No. 70637

Bernard F. Edwards, Jr.,
Respondent,

vs.

Vincent C. Schoemehl, Jr.,
Appellant.

APPEAL FROM THE CIRCUIT COURT
OF THE CITY OF ST. LOUIS

The Honorable Jean C. Hamilton, Judge
(Filed Feb. 14, 1989)

The plaintiff-respondent was appointed City Court Judge of the City of Saint Louis for a term ending April 1, 1989. The appointment is evidenced by a document dated April 16, 1985, and signed by Mayor Vincent C. Schoemehl, Jr. On May 30, 1986, the respondent was notified by letter signed by Marie Jeffries, Deputy Chief of Staff, that he was suspended without pay pending investigation of charges as to whether he "timely complied with the residency requirements ..." of the city charter. The letter of notification commenced with the words, "On behalf of the Mayor of the City of St. Louis."

On June 4, 1986, the respondent filed suit challenging the propriety of his suspension. On June 8 and 11, 1986, Jeffries communicated with him, offering him a hearing relating to charges of misconduct not involving his residency. The trial judge held that these later communications were not material because they involved charges other than those on which the suspension was based. We agree.

Following a bench trial of the issues raised by the respondent's first amended petition the court, on April 16, 1987, entered judgment in favor of the plaintiff, finding that the suspension failed to meet constitutional standards for a variety of reasons. The judgment was accompanied by detailed findings of fact and conclusions of law. The plaintiff was awarded back pay from May 30, 1987 to the date of the judgment. A claim for attorneys' fees was denied and the plaintiff has not appealed. The court of appeals affirmed the judgment on the defendant mayor's appeal. We granted transfer because of the importance of the issues relating to the termination of city officials. We conclude that the judgment is correct and so affirm, for reasons which differ somewhat from those relied on by the trial court and the court of appeals. We do not need to consider all of the issues presented by the parties, but we do dispose of those which have been briefed and which would necessarily impact further litigation relating to the respondent's tenure as city court judge.

I - Removal of City Court Judges

The plaintiff was appointed in accordance with Article VII, Section 1 of the Charter of the City of St. Louis, reading as follows:

> [The mayor] shall appoint and may remove all nonelective officers and all employees, except as otherwise in this charter provided, but shall not remove any office, department or division head appointed by him, except for cause. ...

The position of City Court Judge is established by Article XII, Section 1 of the Charter. The charter is silent as to the procedure for removal of an officer or employee who may be removed only for cause, and we are cited to no ordinance provision.

The plaintiff-respondent argues vigorously that the removal of a city court judge by the mayor violates the principle of separation of powers monumented (sic) by Article II, Section 1 of the Missouri Constitution.[1] We do not agree that there is such a violation. The mayor has the sole and unfettered authority to appoint city court judges, and the power to remove for cause is expressly conferred upon him. The city charter was in force, in substantially its present form, when the Constitution of 1945 was adopted, and Article II, Sec. 1 was taken bodily from the Constitution of 1875. That section was not designed to rule out all interrelation between the various branches of the government. The present controversy relates not to the exercise of the functions of the judicial department, but to the tenure of the judge.

The respondent also argues that the sole method of removal of judges is found in Article V, Section 24 of the Missouri Constitution, providing for the establishment of a Commission on Retirement, Removal and Discipline of judges. *In re Fullwood,* 518 S.W.2d 22 (Mo. banc 1975), holds that judges of the City Court of the City of St. Louis are subject to discipline in accordance with that article. Subsection 3 of Section 24, however, shows positively that the remedies provided by that subsection are not exclusive. *See Fullwood,* 518 S.W.2d at 29 (Bardgett, J., dissenting) for a discussion of other methods of removal.

Article V has been amended since *Fullwood* to make it clear that a municipal court is a part of the circuit court of the county

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[1] Article II, Sec. 1, reads as follows:

> The powers of government shall be divided into three distinct departments—the legislative, executive and judicial—each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

or city in which it functions. Mo. Const. Art. V, §27.2(d). We discern no purpose in this amendment of eliminating any removal procedure previously available. We therefore reject the respondent's challenge to the authority of the mayor. The long established charter provisions giving the mayor the power to remove appointees, subject only to the qualification that an "office, department or division head appointed by" the mayor may be removed only "for cause," do not transgress constitutional boundaries.

II - The Suspension Procedure

Inasmuch as the respondent could be removed only for cause he had a property interest in his job, of which he could be deprived only by procedures consistent with due process of law. *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985); *Belton v. Board of Police Commissioners,* 708 S.W.2d 131 (Mo. banc 1986). The appellant argues that Edwards has no property right under state law and that the due process clause of our constitution should not be construed to incorporate any such right. We do not pursue this contention because the Supreme Court decisions construing the due process clause of the fourteenth amendment impose minimum procedural requirements with which the state and all governmental subdivisions must comply.

The evidence shows that Jeffries, on May 30, 1986, advised the respondent that she wanted to meet with him.[2] She gave him no prior indication of the occasion for the meeting. When he arrived she told him about complaints about his courtroom demeanor and about his failure to pay outstanding parking tickets. There is a conflict in the evidence about whether his place of residence was discussed at the meeting, but we accept

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[2] We take the record facts supportive of the judgment, except when the trial court has found otherwise.

the trial court's finding that Jeffries testified credibly that there was discussion of this subject. Jeffries offered the respondent the opportunity to resign and told him that she was "looking for another judge." The letter notifying him of his suspension without pay was sent following this meeting.

The respondent complains that he was given no notice of the subject matter of the meeting when he was called to attend and that Jeffries presented only "hearsay" information, depriving him of the opportunity to meet his accusers face to face. He argues that this meeting was lacking in the process due for a presuspension hearing of a city court judge. Both the trial judge and the court of appeals appear to have accepted this contention. We do not need to consider it at length but, inasmuch as the book is not completely closed on the incident, we consider it appropriate to call attention to the statement in *Loudermill* that a pretermination hearing, though necessary, "need not be elaborate." 470 U.S. at 546. The point is further analyzed in *Belton,* 708 S.W.2d at 138.[3]

We conclude, nevertheless, that the suspension procedure here employed was fatally flawed. The power to suspend is derived from the power to remove for cause. The power to remove is entrusted to the mayor and to the mayor alone. He must make a finding. There is no showing in the record that the mayor played any part in the decision to suspend. The suspension was decreed by Jeffries. She testified that she reported her action to the mayor, but her testimony was short on details and the trier of the fact was not obliged to accept this testimony. Inasmuch as the appellant mayor could so easily have proved that

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[3] Decisions of the United States Supreme Court and this Court make clear, however, that an informal pretermination hearing is constitutionally sufficient only when a full post-termination hearing is available. *Loudermill,* 470 U.S. at 546, *Belton,* 708 S.W.2d at 138. Post-termination judicial review was available to respondent under § 536.150, RSMo 1986.

the decision was actually his, if such were the fact, we are not disposed to remand the case to permit the taking of additional testimony on the point.

Jeffries bases her claim of authority on a document signed by the mayor, dated January 23, 1986, and authorizing her to take "all personnel actions" in the mayor's name with regard to "employees of mayor's office." The authorization does not fit this case. The respondent was not an employee of the mayor's office, but an officer holding a position specifically established by the charter, in which he did not perform his daily duties under the mayor's supervision. Jeffries expounded fully on the wide sweep of her authority. She claimed that she had the authority to fire the principal officials of the city, such as the city counselor, and to appoint their successors, but we normally take the evidence favorable to the judgment. The respondent has failed to demonstrate that the decision to suspend, conferred only upon the mayor, by Art. VII, Sec. 1 of the City Charter, was actually the decision of the mayor.

The mayor, of course, may make use of assistants in carrying out the manifold duties of his office. We do not say that he is obliged to preside in person over *Loudermill* hearings, or to meet personally with an employee when suspension or discharge is contemplated. He may also allow others to proclaim and to sign his directives, in the manner of a military adjutant publishing the orders of the commanding officer. But he may only delegate execution and implementation, and not decision, especially of a matter in which his express finding of cause is required. It follows that the respondent was never effectively suspended. The record, furthermore, shows no definitive action to effect suspension or termination between the filing of suit and the date of the trial court's decision, either by the mayor or by Jeffries. When the respondent declined the proffered post-termination hearing, no additional action was taken until the trial. He therefore continued on an invalid suspension.

III - Mitigation of Damages

The appellant properly argues that the respondent has a duty to take reasonable steps to mitigate damages by doing what he could to earn income during the time when he would otherwise be attending to his court duties.[4] The city court position was part-time, requiring only afternoon work. The respondent was a partner in a law firm, and, following his suspension, he had more time to devote to the firm's business. He testified at trial, however, that his earnings from law practice had not increased during the six months following his suspension from the judgeship, even though he was available and willing to handle all legal business that appeared. The trial court found that the appellant had failed to carry his burden of proof on the mitigation issue, and we will not disturb this finding.

IV - Further Proceedings

The trial court decreed that the suspension be set aside and that the defendant be reinstated as City Court Judge, with back pay from "the date of his suspension to the date of this order." The judgment did not grant relief beyond that date.

The appellant sought to supplement the record on appeal to show that the mayor, shortly after the adverse judgment was entered, communicated with the respondent in writing, notifying him of the charges against him and offering a hearing. When the proffered hearing was refused the mayor, in a letter which he signed personally, notified the respondent of his dismissal. This post-hearing evidence is not properly a part of the record before us because it involves matters not raised by the pleadings or considered at trial. Inasmuch as the trial court's judgment

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[4] *Edmonds v. McNeal,* 596 S.W.2d 403, 408 (Mo. banc 1980); *Wolf v. Missouri State Training School for Boys,* 517 S.W.2d 138, 143 (Mo. banc 1975); *Davis v. Human Development Corp.,* 705 S.W.2d 540, 544 (Mo. App. 1985).

effectively determined the rights of the parties only up to the date of the judgment, and nothing more, we express no conclusion about the effect of post-trial communications.

The judgment is affirmed.

Charles B. Blackmar, Judge

All concur.

APPENDIX B

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION II

No. 53249

Bernard F. Edwards, Jr.,
Plaintiff-Respondent,

vs.

Vincent C. Shoemehl, Jr.,
Defendant-Appellant.

Appeal from the Circuit Court of the City of St. Louis

Hon. Jean C. Hamilton, Judge

OPINION FILED:

(May 3, 1988)

Vincent C. Schoemehl, Mayor of the City of St. Louis, appeals from an order of the Circuit Court setting aside the Mayor's suspension without pay of Bernard F. Edwards as municipal judge and ordering Judge Edward's reinstatement with back pay. We affirm and remand for further proceedings.

In April of 1985, respondent Edwards was appointed judge of the municipal court of the City of St. Louis by appellant Mayor Vincent C. Schoemehl, Jr. The appointment was for a period ending on the first Tuesday of April, 1989. Respondent performed his duties until he received a letter dated May 30, 1986, from appellant's deputy chief of staff, Marie Jeffries, advising him that he was suspended without pay pending an investigation of "whether you timely complied with the residency require-

ment set forth in Article VIII, Section 2 of the City Charter."[1] The letter invited respondent "to present evidence on this issue to this office at your earliest convenience..." Respondent had met with Mrs. Jeffries on May 30, 1986, pursuant to her request. Prior to the meeting, respondent left a message with Mrs. Jeffries' secretary asking that Mrs. Jeffries advise him what the agenda of the meeting was to be. Respondent received no response to his inquiry prior to the meeting and met with Mrs. Jeffries not knowing what the subject matter of the meeting was to be.

In its findings of fact and with ample support in the record, the trial court found that, at the meeting,

> Ms. Jeffries informed plaintiff (respondent) that she had under consideration charges that plaintiff had acted improperly with respect to various parking tickets, and that he had acted in a rude and improper manner while on the bench. She explained to plaintiff that these charges were based upon complaints by citizens and court personnel, and upon a computer printout which she showed to him and which purported to show that he had failed to pay various parking tickets. The parties agree that plaintiff vigorously defended himself against the charges, stating that they were untrue. He further responded to the allegations by stating that outstanding parking tickets and an objectionable demeanor in the performance of his judicial responsiblities were insufficient grounds for his suspension. Plaintiff was given no opportunity to confront his accusers and Ms. Jeffries suggested he resign because she was going to get herself another judge.

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[1] This section requires that all officers and employees of the City of St. Louis shall reside within the city or establish residence in the city within 120 days of their employment or appointment.

The trial court further found:

> The parties disagree whether plaintiff's residency was discussed at the May 30 meeting. Plaintiff claimed it was not; Ms. Jeffries testified that it was. Ms. Jeffries' memory of the event was reinforced by a document made contemporaneously with the meeting, and is further supported by documents made almost immediately following the meeting. The Court believes that Ms. Jeffries' account is more credible, and, therefore, finds that general charges regarding plaintiff's residency were communicated to plaintiff.

We defer to that finding.

Respondent received the May 30 letter suspending him without pay several days later at his law office. He filed his petition which gives rise to this appeal on June 4, 1986; and, after an evidentiary hearing, the trial court entered its findings of fact, conclusions of law, and order on April 16, 1987. The trial court, holding that respondent had been denied due process in the procedure leading up to his suspension without pay, ordered that the suspension be set aside and that respondent be reinstated with back pay to the date of the court's order.

Although the Supreme Court of Missouri has recognized its authority to discipline and remove municipal judges after a formal hearing before the Commission on Retirement, Removal and Discipline, as provided by Article 5, Section 24 of the Missouri Constitution, *In Re Hines,* 525 S.W.2d 87 (Banc, 1975), *In Re Fullwood,* 518 s.W.2d 22 (Banc, 1975), it has not proclaimed its jurisdiction to be exclusive. A municipal judge, aside from his membership in the judiciary, is an employee of the city and must abide by its rules. Under the provisions of the St. Louis City Charter, the mayor is given authority to appoint "city court judges" for "the term for which the mayor was elected", Article VIII, Section 1, and can remove them for "cause". Article VII, Section 1. We believe "cause" is

equivalent to violations that affect all city employees, for example the residency requirement in Article VIII, Section 2. The mayor is therefore, not without jurisdiction to remove municipal judges, in their capacity as city employees.

We need not, however, determine the jurisdictional issue because Edwards' suspension was lacking in procedural due process.

We apply the standard from *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). The claim of entitlement to due process depends on whether Edwards had a property interest in continued employment. *Id.* 470 U.S. at 538, 105 S.Ct. at 1491, 84 L.Ed.2d at 501. We hold that there was such a property interest. Edwards had a definite tenure, at least as long as the mayor's present term. He was not an employee-at-will because he was appointed for a definite term. See *Amaan v. City of Eureka,* 615 S.W.2d 414, 415 (Mo. banc 1981). Therefore, Edwards did have a property interest in continued employment.

As set forth in *Loudermill, supra,* prior to the deprivation of any property right, a person is entitled to notice and the opportunity to have a hearing appropriate to the nature of the case. The meeting between Edwards and Mrs. Jeffries which occurred on May 30, 1986 fell far short of this mark. Her recitation of "complaints" against Edwards at the outset of the meeting did not constitute appropriate notice. The concept of notice implies an opportunity to prepare a defense, and the gathering of evidence to refute the complaints. Edwards was accorded no such opportunity prior to the meeting. Furthermore, the information with which Mrs. Jeffries confronted the respondent was in large part the rankest form of hearsay: letters complaining about respondent's demeanor on the bench, the fact of anonymous phone calls apparently on the same subject, an unauthenticated computer printout relating to parking tickets, a memorandum from the City's Department of Personnel in-

dicating that respondent was registered to vote in both the City and the County of St. Louis. Such information may constitute grounds for suspicion but clearly does not rise to the level of "cause" for removal as contemplated by the City Charter. Finally, it is of no moment that respondent was accorded several opportunities after this action was commenced to appear before Mrs. Jeffries to present evidence to contradict these suspicions, as no offer was made to present anything more concrete than what had been outlined to him at the meeting. The judgment of the trial court that respondent was denied procedural due process in the proceedings leading up to his suspension without pay is, accordingly, affirmed.

Appellant has filed a motion to supplement the record before this Court by filing documents which indicate that after the trial court rendered its judgment, respondent was accorded an opportunity for a more formal proceeding with documented charges. The proposed supplement to the record also includes a letter to appellant from respondent's attorney refusing, on behalf of the respondent, to participate in the proffered hearing and appellant's response dismissing respondent as a municipal judge. Appellant argues that these facts warrant reversal of the trial court's judgment. These "facts," if facts they be, were not before the trial court and are not properly before us. Accordingly, the cause is remanded to the trial court to determine the truth and effect of the additional claims made by appellant.

Affirmed and remanded for such further proceedings as the trial court deems appropriate.

/s/ Albert J. Stephan, Jr.,
Presiding Judge

Satz, CJ, Pudlowski, J, concur

APPENDIX C

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(St. Louis City)

Cause No. 864-00277

Division No. 3

Bernard F. Edwards, Jr.,
Plaintiff,

v.

Vincent C. Schoemehl, Jr.,
Defendant,

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Findings of Fact

1. Plaintiff, Bernard F. Edwards, Jr. was appointed in April of 1985 to be a judge serving on the municipal court of the City of St. Louis for a term ending on the first Tuesday, in April, 1989.

2. Defendant Vincent C. Schoemehl, Jr., is Mayor of the City of St. Louis.

3. Shortly after plaintiff's appointment, several complaints were made to City officials regarding what was claimed to be plaintiff's rude behavior on the bench. Thomas Mangogna, then serving as Mayor Schoemehl's chief of staff, met with plaintiff and advised him of those complaints. Defendant stated to Mr. Mangogna that the complaints were without merit.

4. On May 30, 1986, plaintiff was requested to attend a meeting scheduled by Marie Jeffries, deputy chief of staff for

Mayor Schoemehl. Plaintiff was given no notice of the subject matter of the meeting prior to his arrival at Ms. Jeffries' office.

5. On May 30, 1986, Ms. Jeffries and the plaintiff met. Ms. Jeffries informed plaintiff that she had under consideration charges that plaintiff had acted improperly with respect to various parking tickets, and that he had acted in a rude and improper manner while on the bench. She explained to plaintiff that these charges were based upon complaints by citizens and court personnel, and upon a computer printout which she showed to him and which purported to show that he had failed to pay various parking tickets. The parties agree that plaintiff vigorously defended himself against the charges, stating that they were untrue. He further responded to the allegations by stating that outstanding parking tickets and an objectionable demeanor in the performance of his judicial responsibilities were insufficient grounds for his suspension. Plaintiff was given no opportunity to confront his accusers and Ms. Jeffries suggested he resign because she was going to get herself another judge.

6. The parties disagree whether plaintiff's residency was discussed at the May 30 meeting. Plaintiff claimed it was not; Ms. Jeffries testified that it was. Ms. Jeffries' memory of the event was reinforced by a document made contemporaneously with the meeting, and is further supported by documents made almost immediately following the meeting. The Court believes that Ms. Jeffries' account is more credible, and, therefore, finds that general charges regarding plaintiff's residency were communicated to plaintiff.

7. After the meeting of May 30 ended, Ms. Jeffries wrote plaintiff informing him that he was suspended without pay, pending further inquiry into his qualifications. The letter specified that the Mayor's office was interested in determining whether he met the residency requirements of his position. The letter did not specifically mention the charges regarding parking

tickets or rude behavior. It is, therefore, unclear what constituted specific basis for the suspension.

8. The notice of suspension dated May 30, 1986, offered plaintiff the opportunity to present evidence only on the issue of residency. The letter stated that "[y]ou are hereby tendered the opportunity to present evidence *on this issue* to this office at your earliest convenience, should you choose to do so." (Emphasis added.)

9. On June 2, 1986, Judge Edwards presented to Ms. Jeffries several affidavits and a copy of a deed which conveyed property in the City to him as evidence that he was living in the city within 120 days following his appointment as judge.

10. On June 4, 1986, plaintiff, having received no response, filed suit contesting his suspension and seeking reinstatement to his office.

11. Other notices, specifically Marie Jeffries' letters of June 9 and June 11, which were sent to plaintiff after this lawsuit had commenced and which offered plaintiff a hearing concerning other allegations of misconduct, are irrelevant because the charges contained in them were not a basis for his suspension, and because these notices were untimely inasmuch as plaintiff had already been suspended and suit to set aside the suspension had already commenced.

Conclusions of Law

1. In his Second Amended Petition for Permanent Injunction, Temporary Injunction and Restraining Order, plaintiff alleges, *inter alia,* that he was suspended without due process from his position as municipal judge in the Municipal Division of the Circuit Court in the City of St. Louis. Plaintiff's due process rights are controlled by the opinion of the United States Supreme Court in *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532 (1985). In *Loudermill,* the Supreme Court held that

certain public employees are entitled to pretermination hearings. The Missouri Supreme Court has held that *Loudermill* required a presuspension hearing in *Belton v. Board of Police commissioners of Kansas City,* 708 S.W.2d 131 (Mo. banc 1986). Therefore, this Court will apply the *Loudermill* criteria to the case at bar.

2. The first *Loudermill* requirement is that plaintiff possess a property right in his continued employment. 470 U.S. at 538. Article VIII, §1 of the St. Louis City Charter authorizes the Mayor to appoint city court judges "to hold for the term for which [the Mayor] was elected...." Further, §479.020 (1) RSMo., states that municipal judges shall be selected for a term of not less than two years as provided by charter or ordinance." Section 479.020(5) states that municipal judges are judges and divisions of the Circuit Court and are under the general administrative authority of the presiding judge of the Circuit Court. Section 479.020(5) also makes reference to merit retention. This Court concludes that, first, plaintiff is not an employee-at-will. Section 479.020(2) provides for a definite minimum term. Plaintiff was appointed until April, 1989. Plaintiff would be an employee-at-will only if he were appointed for an indefinite term. *Amann v. The City of Eureka,* 615 S.W.2d 414, 415 (Mo. banc 1981); *Enyeart v. Shelter Mutual Insurance Co.,* 693 S.W. 2d 120, 122 (Mo. App. 1985). Second, on the same grounds, plaintiff has met the property right requirement of *Loudermill.*

3. As a matter of due process, plaintiff is entitled to "notice and opportunity for hearing *appropriate to the nature of the case."* 470 U.S. at 542. (Emphasis added). The Supreme Court pointed out that the "formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. . . . In general, 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action." *Id.* at 545. Due process requires "oral or written notice of the charges

against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 546. This Court concludes that plaintiff, a judge, was not afforded due process under *Loudermill* in view of the circumstances. Plaintiff received neither adequate notice of the agenda of his meeting with Ms. Jeffries nor notice that this meeting was in fact a presuspension hearing. The alleged hearing of May 30 was conducted by the same person who conducted the investigation, who would make the decision, and who apparently had already made up her mind. Such informal and summary procedures are insufficient to support the suspension of a judge.

This Court further notes that the Missouri Supreme Court has held that the Commission on Retirement, Removal and Discipline has jurisdiction to inquire into allegations against and to suspend a municipal judge. *In re Fullwood,* 518 S.W.2d 22 (Mo. banc 1975). This holding underscores the deference given to due process rights by the Missouri Supreme Court in the exercise of its supervisory authority over judges. It is inconsistent and legally untenable that municipal court judges are afforded procedural due process by one supervisory entity, the Missouri Supreme Court through the Commission on Retirement, Removal and Discipline, but are denied procedural due process by another entity having concurrent jurisdiction to suspend.

4. Because the plaintiff was denied procedural due process, this Court considers neither the validity of the charges made against plaintiff nor whether such charges, if true, would be sufficient to justify a suspension without pay if proper procedures are followed.

5. This Court concludes that defendant has failed to carry his burden of proof on the issue of mitigation of damages. *E.g., Cline v. City of St. Joseph,* 245 S.W.2d 695 (Mo. App. 1952). Therefore, an award of back pay will not be offset by unproved allegations of mitigation.

6. Plaintiff urges that the Court award him attorney fees on the theory that this case was necessary collateral litigation for which attorney fees might properly be awarded. See *Forsythe v. Starnes,* 554 S.W.2d 100, 111 (Mo. App. 1977). "Collateral litigation" occurs when a person who breaches a contract causes the contracting party to sue or be sued by a *third party. Ohlendorf v. Feinstein,* 697 S.W.2d 552 (Mo. App. 1985) (Emphasis added). This case is not collateral litigation. Plaintiff shows no other authority for an award of attorney fees. Therefore, no attorney fees will be awarded. *See O'Neil Lumber Co. v. Allied Builders Corp.,* 663 S.w.2d 326 (Mo. App. 1983).

ORDER

WHEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the suspension of plaintiff be set aside and that plaintiff be reinstated to his position as City judge with back pay from the date of his suspension to the date of this order.

SO ORDERED:

/s/ Jean C. Hamilton, Circuit Judge

Dated: April 16, 1987

cc: Raymond Howard
Julian Bush

APPENDIX D

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
Post Office Box 150
Jefferson City, Missouri
65102

Thomas F. Simon
Clerk

Telephone
(314) 751-4144

March 14, 1989

Mr. Julian L. Bush
Assistant City Counselor
314 City Hall
St. Louis, Missouri 63103

Re: Bernard F. Edwards vs. Vincent C. Schoemehl Jr.,
No. 70637

Dear Mr. Bush:

This is to advise that the Court this day entered the following order in the above-entitled cause:

"Appellant's motion for rehearing overruled."

Very truly yours,

/s/ Thomas F. Simon
Clerk

cc: Mr. Raymond Howard